

- (a) For any transaction resulting in a change of ownership, the valuation of the asset(s) shall be limited to the lesser of the allowable acquisition cost of the asset(s) to the first owner of record who has received Medicaid payment for the asset(s) in question on or after August 1, 1982, minus any paid depreciation (i.e., seller's net book value) or the acquisition cost of the asset to the new owner.
- (b) Costs (including legal fees, accounting and administrative costs, travel costs, and the costs of feasibility studies) attributable to the negotiation or settlement of the sale or purchase of any capital asset (by acquisition or merger) for which any payment has previously been made under Medicaid, shall not be allowable for reimbursement.
- (c) If a facility's real property assets are sold or leased, or subject to any other transaction which results in a net decrease in the real property cost to the provider, the real property cost portion of a facility's rate shall be prorated accordingly. For the purpose of this section, real property assets refers to buildings, building improvements and fixed equipment. Real property costs are the costs directly related to real property assets.
- (ix) A facility's annual rental payments for real property and maintenance charges associated with cooperative shares may be considered an allowable cost subject to the following conditions:
  - (a) The lease or in the case of cooperative shares, the subscription agreement is reviewed by and acceptable to OMRDD and any other State agency which must by law or regulation review and approve reimbursement rates.
  - (b) The lease agreement must be considered an "arms length transaction" not involving either an affiliate, controlling person, immediate family or principal stockholder.
  - (c) The "arms length transaction" requirement may be waived by the Commissioner upon application for those corporations holding title to the intermediate care facility's physical plant, created pursuant to the not-for-profit corporation law with the approval of the Commissioner.
  - (d) For the purposes of this Section "Affiliate" means:
    - (1) With respect to a partnership, each partner thereof.

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- (2) With respect to a corporation, each officer, director, principal stockholder and controlling person thereof.
- (3) With respect to a natural person, each member of said person's immediate family or each partnership and each partner of such person or each corporation in which said person or any affiliate of said person is an officer, director, principal stockholder or controlling person.

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- (e) For the purposes of this Section, "Controlling person" of any corporation, partnership or other entity means any person who by reason of a direct or indirect ownership interest (whether of record or beneficial) has the ability, acting either alone or in concert with others with ownership interest, to direct or exert a controlling influence on the direction of the management policies of said corporation, partnership or other entity. Neither the Commissioner, nor any employee of the OMRDD, nor any member of a local legislative body of a county or municipality, nor any county or municipal official except when acting as the administrator of a facility, shall by reason of his or her official position be deemed a controlling person of any corporation, partnership or other entity nor shall any person who serves as an officer, administrator or other employee of any corporation, partnership or other entity or as a member of a board of directors or trustees of any corporation be deemed to be a controlling person of such corporation, partnership or other entity solely as a result of such position or his or her official actions in such position.
- (f) For the purposes of this Section, "Immediate family" means brother, sister, grandparent, grandchild, first cousin, aunt or uncle, spouse, parent or child of such person whether such relationship arises by reason of birth, marriage or adoption.
- (g) For the purposes of this Section, "Principal stockholder" of a corporation means any person who beneficially owns, holds or has the power to vote, ten percent or more of any class of securities issued by said corporation.
- (h) The rental amount is comparable to similar leases for properties with similar functions in the same geographic area.
- (i) If the above criteria are not met, reimbursement for lease costs will be determined in accordance with §(c)(10)(x) and (xii).
- (j) Lease options to renew shall not be exercised without review and approval of the parties listed in §(c)(10)(ix)(a). Such review and decision shall occur whenever possible more than 30 days before the last date the option may be exercised, the date of which the facility has notified OMRDD in accordance with §(c)(10)(ix)(k).

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- (k) Effective January 1, 1983, request for approval of lease renewals must be submitted whenever possible at least 120 days prior to the last date for the exercise of the lease renewal option.
- (x) Depreciation shall be an allowable cost when based upon factors of historical costs and useful life of buildings, fixed equipment and/or capital improvements[.] or acquisition of an interest in real property manifested by cooperative shares. For the purposes of this section:
- (a) Unless an exception is made by the Commissioner, the useful life shall be the higher of the reported useful life or those from the "Estimated Useful Lives of Depreciable Hospital Assets" (1983 Edition), published by the American Hospital Association and available by writing to the American Hospital Association, 840 Lake Shore Drive, Chicago, Illinois 60611. On an exception basis, a useful life that is based upon historical experience as shown by documentary evidence and approved by OMRDD may be allowed.
- (b) The depreciation method used shall be the straight line method.
- (c) In the event that the historical cost of the facility cannot be adequately determined by the Commissioner, an appraisal value shall be the basis for depreciation. The appraisal of the historical cost of assets shall produce a value approximating the cost of reproducing substantially identical assets of like type, quality, and quantity at a price level in a reasonably competitive market as of the date of acquisition. Such appraisal shall be conducted by an appraiser approved by OMRDD and pursuant to a method approved by OMRDD.
- (d) Notwithstanding §(c)(10)(xiv) below, in the case of any provider which has been notified by OMRDD on or after April 1, 1986 that there is a preliminary reservation of State aid funds for a capital grant pursuant to Mental Hygiene Law §41.18(c) or §41.23, the basis for computing depreciation on the facility which is the subject of the capital grant shall include the facility's depreciable project costs which were funded with such capital grant, provided that the provider is not receiving and does not have a commitment to

receive HUD funding for the facility, and has not repaid the entire principal owed on the real property of the facility. If the depreciable project costs are adjusted after audit, the basis for computing depreciation on the facility will be changed to such adjusted depreciable project costs. Upon full repayment of principal, the basis for depreciation for the facility will cease to include the amount of the capital grant. Any provider which receives such a capital grant shall enter into certain assurances with the OMRDD whereby the provider agrees that:

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- (1) The difference between depreciation in the rate attributable to the facility's depreciable project costs (other than depreciation attributable to the provider's equity in the facility's real property at the time such property is put into use as a facility) and the principal which is repaid shall be deposited in a separate secure investment approved by the commissioner;
- (2) Withdrawals from such investment shall be made only for the purpose of repayment of indebtedness owed on the real property of the facility.
- (3) Each withdrawal must be approved by the commissioner, and;
- (4) If the provider ceases to operate the facility as an intermediate care facility for developmentally disabled or as any facility certified by OMRDD, it will repay to the OMRDD the balance on deposit in the secure investment at the time of such cessation, including interest earned on the investment.
- (5) "Depreciable project costs" shall mean those acquisition and construction costs of a facility which have been approved, either before or after audit, by the New York State Office of the State Comptroller or by OMRDD or by OMRDD's designee. Such costs shall not include the cost of land.
- (6) "HUD funding" shall mean lower income housing assistance under §8 of the United States Housing Act of 1937, as amended, (42 U.S.C. §1437(f)) and/or a loan or loans pursuant to §202 of the Housing Act of 1959, as amended, (12 U.S.C. §1701q).
- (g) Notwithstanding §(c)(10)(xiv) below, any provider which has been notified by OMRDD before April 1, 1986 that there is a preliminary reservation of State aid funds for a capital grant pursuant to Mental Hygiene Law §41.18(c) or §41.23, which is not receiving and has no commitment to receive HUD funding for the facility which is the subject of the capital grant, may apply to the commissioner to have the basis for computing depreciation on the facility include the facility's depreciable project costs which were funded with the capital grant. Such application must be submitted to the commissioner on or before September 30, 1986 on the forms prescribed by the commissioner. Such application shall be granted at the discretion of the commissioner upon a showing that including in the depreciation basis the facility's depreciable project costs which were funded with the capital grant is necessary to the financial viability of the facility and will not adversely affect the facility's ability to operate in an efficient and economical operation. If the commissioner approves such

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application, the facility's rate shall be revised retroactive to April 1, 1986 to include in the depreciation basis the facility's depreciable project costs which were funded with the capital grant, and the provider shall enter into certain assurances described in §(c)(10)(x)(d) above. Upon full repayment of principal, the basis for depreciation for the facility will cease to include the amount of the capital grant. If the depreciable project costs are adjusted after audit, the basis for computing depreciation on the facility will be changed to such adjusted depreciable project costs.

- (xi) Costs related to moveable equipment, furniture and fixtures may be considered an allowable cost subject to the following:
- (a) Depreciation based upon historical cost of moveable equipment, furniture and fixtures is considered an allowable cost. The useful life shall be the higher of the reported useful life, or those from the "Estimated Useful Lives of Depreciable Hospital Assets" (1983 Edition), published by the American Hospital Association and available by writing to the American Association, 840 Lake Shore Drive, Chicago, Illinois 60611. A useful life that is based upon historical experiences as shown by documentary evidence and approved by OMRDD may be allowed.
  - (b) The facility shall use the straight line, double declining balance or sum of the years digits depreciation method. The depreciation method utilized must remain consistent throughout the useful life of an asset.
  - (c) Lease payments may be an allowable cost if the payments are made under a lease which is an "arms length transaction" as described in §(c)(10)(ix)(b).
  - (d) Any personal property and equipment transactions shall be through a multiple bid process and entered into at a fair market value price.
  - (e) If lease payments are not made pursuant to an "arms length agreement", allowable costs will include allowable depreciation, the associated interest expense, if any, and other related expenses, including but not limited to maintenance costs.
- (xii) Interest cost may be considered an allowable cost subject to the following:

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- (a) Interest for capital indebtedness, where the interest expenses results from either start-up costs and/or the initial financing of the capital indebtedness and the capital indebtedness represents all or part of the current OMRDD and Division of the Budget approved value of the property after subtracting any equity contributions such as but not limited to grants applied to the subject property, will be considered allowable; provided that in the case of interest payments on FDC mortgage loans pursuant to (c)(10)(xvi), interest for capital indebtedness and start-up costs will be considered allowable where interest expense results from capital indebtedness and start-up costs in an amount equal to the OMRDD and Division of the Budget approved value of the FDC loan.
- (b) An interest rate shall not be in excess of the amount a prudent borrower would pay at the time the loan was incurred.
- (c) The loan agreement must be entered into between parties not related through control, ownership, affiliation or personal relationship as defined in Section (c)(10)(ix)(d), unless this provision is waived by the commissioner. Such waiver shall be based on, but not limited to, a demonstration of need for the program and cost savings resulting from the transaction.
- (d) Interest income generated from the facility's revenues for the operation of the facility shall be used to offset interest expense incurred during the same reporting period. Notwithstanding the foregoing, a facility is not required to use the following to offset interest expense; income earned on qualified pension funds, income from gifts or grants which is donor-restricted, or income earned on secure investments pursuant to Section (c)(12) or section (c)(10)(x)(d) or (e).
- (e) Interest on working capital indebtedness in accordance with standards contained herein and subject to the limitations of Section (f)(1)(i) and (f)(2)(i) will be considered allowable. In the event that a loan is not in accordance with the standards listed above, then the approval of the commissioner is required.



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- (f) Interest for capital indebtedness, as defined in (c)(10)(xii)(a) of this section where the interest expense results from the refinancing of the capital indebtedness, and refinancing has the prior approval of the commissioner and the Division of the Budget, pursuant to (c)(10)(viii), will be allowed in that amount associated with the outstanding principal balance prior to refinancing; provided that in the case of interest payments on FDC mortgage loans pursuant to (c)(10)(xvi) interest costs may be allowed in excess of the amount associated with the outstanding principal balance prior to refinancing, if the purpose of the debt is to acquire assets to be used for care of persons served by the facility and all other applicable requirements of this part are met. Interest expense resulting from the inclusion of the reasonable closing costs, (such as, but not limited to, attorney fees, recording costs and points) in the refinancing transaction will also be considered allowable.

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(xiii) Costs of related organizations, other than costs incurred pursuant to a lease, rent or purchase of real property, may be considered an allowable cost subject to the following:

(a) A "related organization" means any entity of which the provider is in control or which the provider is controlled by (subject to the limitations in §(c)(10)(ix)(e)), either directly or indirectly, or where a common ownership or financial interest exists in an entity which supplies goods and/or services to the facility.

(b) The costs of goods and/or services furnished to a facility, within the course of normal business operations, by a related organization are allowable at the cost to the related organization, or the market price of comparable goods and/or services available in the facility's region, whichever is lower.

(xiv) Restricted funds are funds expended by the facility which include grants, gifts, and income from endowments, whether cash or otherwise, which must be used only for a specific purpose as designated by the donor or grant instrument. Except as provided for in §(c)(10)(x)(d) and (e), restricted funds are to be deducted from the designated costs when determining allowable costs. The Commissioner may waive the provisions of this sub-[S]section at his discretion only in those instances where the provider makes a reasonable showing that the imposition of the requirements of this subsection would have a material adverse effect on the facility's capability to operate in an efficient and economical manner.

(xv) If OMRDD is unable to compute a rate for a newly certified facility, OMRDD shall establish an interim rate which shall be based upon the regional average operating cost for comparable facilities, and site specific prior approved property. (This subsection is only applicable to under 31 bed intermediate care facilities).

(a) The OMRDD shall replace the interim rate retroactively to the starting date of such interim rate by a rate developed from the initial budget report submitted by the facility.

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